

A TAN SRI DATO (DR) ROZALI ISMAIL & ORS

v.

GARY LIM TING HOWE & ORS

B COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-106-01-2013]
C 14 FEBRUARY 2014

CIVIL PROCEDURE: *Intervention - Application for - Bankruptcy proceedings - Bankrupt person declared mentally unfit - Exemption from public examination on bankrupt person due to mental health - Application to set aside court's order on mental health by Director General of Insolvency ('DGI') and appellants - Application dismissed - Decision of DGI not to pursue appeal - Application by appellants to intervene and be given chance to challenge status of mental health - Findings of private investigator - Whether appellants' rights subsumed in DGI - Whether appellants' locus standi to intervene evaporated when DGI abandoned appeal*

F In the High Court, the third respondent had obtained judgment in the sum of RM35,087,135.06 against the appellants and the said sum was paid to the third respondent. However, an appeal to the Court of Appeal resulted in the setting aside of the High Court suit and the third respondent was ordered to make a necessary refund to the appellants which the former failed to make. Subsequently, in a bankruptcy proceeding against the third respondent, the latter was adjudged a bankrupt. The third respondent obtained two orders under the Mental Health Act 2001 ('the Act') which declared him as *prima facie* to be mentally unfit to manage his affairs. The Director General of Insolvency ('DGI') and the appellants applied to set aside the orders made under the Act but the applications were dismissed. At the commencement of the appeal hearing, the DGI decided not to pursue the appeal and the appeal was struck out. The appellants applied to intervene in this originating summons and contended that the 'mental status' of the third respondent contradicted the appellants' own investigation. Contradictory evidence obtained by
I a private investigator revealed that the third respondent was seen, *inter alia*, shopping, playing golf and travelling abroad. The

appellants further contended that all they required from the court was simply to be given a chance to challenge that ‘mental status’. In opposing the appellants’ application, the respondents submitted that the appellants’ rights had been subsumed in the DGI and when the DGI abandoned his appeal, the appellants’ *locus standi* evaporated.

**Held (allowing appeal; setting aside decision of High Court)
Per David Wong Dak Wah JCA delivering the judgment of the court:**

- (1) Anyone with any information might seek remedy in the court to challenge the status of the third respondent’s mental state. With such clear provisions in a specific statute, the court is empowered to disregard the impediments alluded by the respondents. The mental status of any person is a fluid matter and changes to it can and do occur as acknowledged by the Act itself. (para 21)
- (2) Had the High Court judge approached the issue of *locus* of the appellants in the context of the Act, His Lordship would have concluded that the appellants have a legitimate interest to intervene in the present suit. Justice and fair play demands that the appellants be given a chance to question and challenge the mental status of the third respondent. Whether the appellants would succeed in their quest would be of no concern to the court. The surveillance report on the third respondent by the appellants had provided the court adequate reasons enough to grant leave to intervene. (para 22)

Bahasa Malaysia Translation Of Headnotes

Di Mahkamah Tinggi, responden ketiga telah mendapatkan penghakiman berjumlah RM35,087,135.06 terhadap perayu-perayu dan jumlah tersebut telah dibayar kepada responden ketiga. Walau bagaimanapun, rayuan ke Mahkamah Rayuan telah menyebabkan pengenehan guaman Mahkamah Tinggi tersebut dan responden ketiga diarahkan membuat pemulangan yang perlu kepada perayu-perayu yang mana gagal dibuat oleh responden ketiga. Seterusnya, dalam prosiding kebangkrutan terhadap responden ketiga, dia diisytiharkan sebagai seorang bankrap. Responden ketiga mendapatkan dua perintah di bawah Akta Kesihatan Mental 2001 (‘Akta’) yang mengisytiharkannya, secara *prima facie*, sebagai

- A seorang yang tidak berkelayakan mental untuk mengendalikan urusan-urusannya. Ketua Pengarah Insolvensi ('KPI') dan perayu-perayu memohon untuk mengenenpikan perintah-perintah yang dibuat di bawah Akta namun permohonan-permohonan tersebut ditolak. Pada permulaan perbicaraan rayuan, KPI memutuskan
- B untuk tidak meneruskan dengan rayuan dan rayuan tersebut dibatalkan. Perayu-perayu memohon untuk mencelah dalam saman pemula ini dan menghujahkan bahawa 'status minda' responden ketiga bercanggah dengan siasatan perayu-perayu sendiri. Keterangan bercanggah yang diperolehi daripada penyiasat persendirian
- C mendedahkan bahawa responden ketiga dilihat, antara lain, membeli-belah, bermain golf dan melancong ke luar negara. Perayu-perayu selanjutnya menghujahkan bahawa apa yang dipohon daripada mahkamah hanyalah agar diberi peluang untuk mencabar 'status minda' tersebut. Dalam menentang permohonan perayu-perayu, responden-responen menghujahkan bahawa hak-hak perayu-perayu, diserap kepada KPI dan apabila KPI meninggalkan rayuannya, *locus standi* perayu-perayu terhapus.

Diputuskan (membenarkan rayuan; mengenenpikan keputusan Mahkamah Tinggi)

- E **Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:**

- (1) Sesiapa yang mempunyai maklumat boleh mendapatkan remedi dalam mahkamah untuk mencabar status minda responden ketiga. Dengan peruntukan jelas dalam statut khas, mahkamah mempunyai kuasa untuk tidak mengambil kira halangan-halangan yang dicadangkan oleh responden-responen. Status minda mana-mana orang adalah perkara bolehubah dan penukarannya akan dan ada berlaku seperti yang dimaktubkan dalam Akta sendiri.
- (2) Sekiranya Hakim Mahkamah Tinggi memberi pendekatan pada isu *locus* perayu-perayu dalam konteks Akta, beliau akan memutuskan bahawa perayu-perayu mempunyai kepentingan sah untuk mencelah dalam guaman ini. Keadilan menuntut agar perayu-perayu diberikan peluang untuk mempersoalkan dan mencabar status minda responden ketiga. Sama ada perayu-perayu akan berjaya dalam usaha mereka tidak penting kepada mahkamah. Laporan pengawasan ke atas responden ketiga oleh perayu-perayu telah memberikan mahkamah alasan-alasan yang cukup untuk memberi kebenaran untuk mencelah.

Legislation referred to:

Mental Health Act 2001, s. 62

Rules of the High Court 1980, O. 15 r. 6(2)(b)

*For the appellants - Ghazi Ishak; (BE Teh & Fadzilah Pilus with him);
M/s Teh & Assocs**For the respondents - Bastian Vendargon; (Richard WG Lee & Harvinderjit
Singh with him); M/s Richard Lee**[Appeal from High Court, Kuala Lumpur; Suit No: 24 NCVG-1018-04-
2012]**Reported by Najib Tamby***JUDGMENT****David Wong Dak Wah JCA:****Introduction**

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed the appellants' application to intervene in this originating summons.

[2] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

Factual Background

[3] The third respondent had on 29 November 2010 obtained judgment in the sum of RM35,087,135.06 against the appellants in suit S22-1108-2007 (High Court suit).

[4] Judgment under the High Court suit was not able to be stayed by the appellants resulting in the full judgment sum being paid to the third respondent's solicitors on 28 February 2011.

[5] On 7 July 2011, the appellants were successful in their appeal in the Court of Appeal resulting in the judgment in the High Court suit being set aside and with an order of repayment made against the third respondent by the Court of Appeal.

[6] However, the third respondent failed to make the necessary refund to the appellants.

- A [7] In view of the aforesaid failure, bankruptcy proceedings commenced against the third respondent and on 9 November 2011 the third respondent was adjudged a bankrupt.
- B [8] The first creditors' meeting was held on 9 February 2012 which resolved that the first public examination be conducted on 6 April 2012. However the aforesaid date was adjourned at the request of the solicitors of the third respondent on the ground that the third respondent was unwell.
- C [9] The public examination was then held on 26 April 2012, in which the third respondent was examined by the officer of the Department of Insolvency, Selangor. The next fixed date for public examination was to be held on 14 May 2012.
- D [10] However, it became apparent unknown to anyone, the third respondent had obtained two orders dated 25 April 2012 and 27 April 2012 respectively under the Mental Health Act 2001 in this suit which in effect found the third respondent was *prima facie* to be mentally unfit to manage his affairs. A committee comprising of Gary Lim (first respondent) and Madam Loh Fui Fin (second respondent) was also appointed by the court to manage the third respondent's affairs. In view of the orders obtained, the committee applied for dispensation of further public examination of the third respondent.
- E [11] In view of the above developments, both the Director General of Insolvency and the appellants took out applications to set aside the order made under the Mental Health Act.
- F [12] The learned judge dismissed both applications on 14 December 2012. Appeals against the learned judge were lodged and it is these appeals we are now dealing with.
- G [13] At the commencement of the appeal hearing, counsel for the DGI informed the court that they are not pursuing the appeal and hence requested that their appeal be struck out which we duly did. This leaves us with the appeal of the appellants which we now deal with.
- H

High Court Decision

- I [14] The application by the appellants is encapsulated in the summons in chambers which pray for the following orders:

- (A) Pursuant to O. 15 r. 6(2)(b) of the Rules of the High Court, 1980: A
- (i) That the abovenamed Interveners be granted leave to intervene in these proceedings and be added as the second, third and fourth defendants respectively; B
 - (ii) That the title of this action be amended accordingly;
 - (iii) That such consequential orders or directions be given or made as this Honourable Court deems just or expedient. C
- (B) Pursuant to s. 62 of the Mental Health Act 2001 (Act 615) and/or under the inherent jurisdiction of this Honourable Court:
- (i) That the orders of this Honourable Court made on 25 April 2012 and 27 April 2012 be set aside; D
 - (ii) That such further or other orders or directions be made or given as this Honourable Court deems just and expedient. E
- (C) That the costs of and occasioned by this application be paid by the committee appointed under the order dated 27 April 2012.
- [15]** The learned judge's rationale in dismissing the summons in chambers can be gleaned from the following passages: F
- Locus standi:*
- Mr B. E. Teh in addressing the Court on 22.11.2012 did concede that the Pencelah (the JCs) had no *locus standi* unlike KPI. Nevertheless he did address the Court on 22.11.2012 and 13.12.2012 in support of enclosure 14. My finding is that the Pencelah lacked the *locus* to enable them to intervene. G
- Setting aside of perfected order: H
- The law in regard to the setting aside of a perfected order is trite. The leading case on this subject is the Federal Court decision of *Badiaddin bin Mohd Mahadin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. It states that final orders regularly obtained cannot be set aside unless the final order could be proved to be null and void on the grounds of illegality or lack of jurisdiction. Apart from breach of I

- A rules of natural justice, in any attempt to widen the door
of the inherent and discretionary jurisdiction of the superior
Courts to set aside an order of Court *ex debito justitiae* to a
category of cases involving orders which contravened “any
written law”, the contravention should be one which defies
B a substantive statutory prohibition so as to render the
defective order null and void on ground of illegality or lack
of jurisdiction. The discretion to invoke the inherent
jurisdiction should also be exercised judicially in exceptional
cases where the defect is of such a serious nature that there
is a real need to set aside the defective order to enable the
C Court to do justice. In all cases, the normal appeal
procedure should be adopted to set aside a defective order,
unless the aggrieved party could bring himself within the
special exception. See also *Tan Sri Dato Rozali Ismail (DR)*
v. Kim Pang Cheing [2012] 2 CLJ 849 @ 54 quoting Lord
D Denning MR in *Becker Noel & Anor* (1971) 1 WLR 803. It
is my decision that there is no illegality. Neither did the
Court lack jurisdiction when it handed down the Order of
26.4.2012.

Our Grounds Of Decision

- E [16] It is the contention of the respondents that whatever the
appellants’ rights may have are subsumed in the DGI in view of
the status of the third respondent as a bankrupt. And when the
DGI abandoned his appeal, the appellants’ *locus standi* evaporates
F with that decision of not appealing.
- G [17] The appellants’ main grouse here is simply that the ‘mental
status’ of the third respondent is suspect to say the least in view
of evidence to the contrary obtained from the appellants’ own
investigation. These contradictory evidence obtained by a private
investigator are that the third respondent was seen “doing his
shopping, playing golf, having his car washed, attending at Pantai
Hospital, travelling abroad and making phone calls”. In this
application all they require from the court is simply to be given a
chance to challenge that ‘mental status’.
- H [18] The contention of the respondents set out above is on a
 cursory glance attractive to say the least in the context of this
case.
- I [19] However we are attracted to the appellants’ contention that
where ‘case law which closes the door to litigant who wishes to
intervene on grounds of *functus officio* or that the order of court
has been perfected, ought to give way to statutory direction’.

[20] Learned counsel refer the court to the following provisions: **A**

Section 55:

Power to send person alleged to be mentally disordered to a government psychiatric hospital or a gazetted private psychiatric for purpose of observation. **B**

- (1) The Court may, in lieu of or in addition to its powers under section 54, and on such evidence as it deems sufficient, make an order that the person alleged to be mentally disordered be admitted into a government psychiatric hospital or a gazetted private psychiatric hospital for observation for a period not exceeding one month; and the Court may on subsequent application by the Medical Director order an extension for a further period of observation not exceeding one month. **C**

Section 62: **D**

Subject to this Act, the Court may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just but no order for costs shall be made under this section against any public officer. **E**

Section 74:

Annuling proceedings: **F**

- (1) Where a person has been found to be incapable of managing himself and his affairs due to his mental disorder and it is subsequently shown to the Court:

- (a) on the application of that person; **G**
(b) on the application of a person acting on his behalf; or
(c) on the information of any other person.

that there is reason to believe that such incapability has ceased, the Court may make an order for an inquiry to determine whether the person is now capable of managing himself and his affairs. **H**

[21] From the above provisions, it is quite clear that anyone with any information may seek remedy in court to challenge the status of mental state of the third respondent. With such clear provisions **I**

- A in a specific statute, the court is empowered to disregard the impediments alluded by learned counsel for the respondents. It must not be forgotten that the mental status of any person is a fluid matter and changes to it can and do occur as acknowledged by the Mental Health Act itself when it contains provisions set out earlier.
- B

- [22] We are in no doubt that had the learned judge approached the issue of *locus* status of the appellants in the context of the Mental Health Act, he would have concluded that the appellants have a legitimate interest to intervene in this suit. It is our view that justice and fair play in the context of this case demands that the appellants be given a chance to question and challenge the mental status of the third respondent. Whether the appellants succeed in their quest is of no concern to us at this juncture. The surveillance report on the third respondent by the appellants has provided us adequate reasons enough to grant leave to intervene.
- C
- D

Conclusion

- [23] For reasons stated above, we allow the appeal, set aside the High Court's decision and grant the following orders:
- E

- (i) Leave is granted to the interveners to intervene and be added as the second, third and fourth defendants respectively.
- (ii) That title to this originating summons be amended accordingly.
- F

In respect of costs, we award the sum of RM10,000 against the first respondent to be paid to the appellants.

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